



FINAL REPORT

Freedom of Information, Open Meetings, and Public Records Interim Study Committee

July 2008

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Senator Daryl Beall
Senator Jeff Danielson
Senator Mary A. Lundby
Senator Pat Ward

Representative Vicki Lensing, Co-chairperson
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AUTHORIZATION AND APPOINTMENT

The Freedom of Information, Open Meetings, and Public Records Study Committee was created by the Legislative Council for the 2007 Legislative Interim and charged with reviewing and recommending changes to Iowa's open meetings (Code chapter 21) and public records laws (Code chapter 22) laws and the State Records and Archives Act (Code chapter 305). The Committee was initially authorized for three meeting days and subsequently requested and received approval to hold two additional meetings. The meetings were held on September 6, 2007, October 19, 2007, November 9, 2007, January 10, 2008, and February 7, 2008.



Freedom of Information, Open Meetings, and Public Records Interim Study Committee

I. September 6, 2007, Meeting

Overview. The first meeting of the Committee included presentations from Professor Arthur Bonfield, University of Iowa Law School; Mr. William Angrick, Citizens' Aide/Ombudsman; the Honorable Tom Miller, Iowa Attorney General; Mr. Gordon Hendrickson, State Archivist; the Honorable Robert Hutchison, Fifth Judicial District Judge; Ms. Rebecca Colton, Counsel to the Iowa Supreme Court Chief Justice, Judicial Branch; and Mr. Tom Shepherd, Department of Administrative Services (DAS), Information Technology Enterprise. The Committee also heard presentations and received written testimony from various interest groups and other interested persons.

Professor Arthur Bonfield. Professor Bonfield highlighted the following issues and concerns about the current statutory language in many provisions of Iowa's open meetings and open records laws as well as the State Archives and Records Act:

- Emphasizing the need for more accurate and precise definitions describing the different types of public access to government information.
- Determining whether very tentative or preliminary ideas or opinions should be subject to mandatory public disclosure.
- Determining the amount of information that must be disclosed in relation to public employment applications as well as the discussions accompanying the processing of those applications.
- Rewriting and consolidating many of the current 59 confidential records exemptions in the public records laws including but not limited to exemptions relating to personnel records, Social Security numbers, and peace officer investigative reports, and including several additional exemptions from public disclosure such as state licensee personal information.
- Reexamining the scope of existing judicial authority to restrain the examination of government information otherwise subject to public inspection.
- Specifying the scope of the discretion of a custodian of a public record to release information otherwise exempt from mandatory public disclosure.
- Adding a provision to the open records law to ensure government records do not lose their disclosure status when the records are transferred to the custody of another official, agency, institution, or person.
- Clarifying the public availability of final settlement agreements between an agency and another entity or person.
- Specifying the timeline within which government information must be made available to the public.
- Reevaluating the definition of a government body, including the definition of advisory bodies, and the definition of a meeting in the open meetings law.
- Strengthening the mechanisms available for enforcement of public information requirements by designating a state official to investigate open meetings and public records complaints or an independent regulatory administrative body to enforce violations of such laws.



State Ombudsman William Angrick. Mr. Angrick stated that reports of noncompliance with both public records and open meetings laws have increased with "frequency and audacity" despite increased training efforts by organizations such as the Iowa League of Cities, the Iowa State Association of Counties, and the Iowa Freedom of Information Council, and the creation of a new position in the Ombudsman's Office to respond to public records and open meetings complaints. He discussed the type of information that should be made available to the public concerning applications for government employment, the need to address the practice of "walking quorums" by members of a governmental body where less than a majority of members rotate in and out of a meeting to avoid the requirements of the public meetings law, and the need to specify the definition and nature of a public record under both the public records and the state records and archives laws. Mr. Angrick also discussed the need to review open records issues relating to investigative reports prepared by law enforcement.

Attorney General Tom Miller. Mr. Miller expressed the need for legislation that clearly prohibits walking quorums and e-mail meetings, two practices that are frequently used to circumvent the requirements of the open meetings law. He also stated his commitment to working toward public accessibility of settlement agreements. Mr. Miller stated he would be willing to consider prosecuting violations of Iowa's open meetings and open records laws at the local government level. Currently, such prosecutions are left to the discretion of local county attorneys. Mr. Miller stated he would need additional funding to cover the increased expenses associated with such prosecutions.

State Archivist Gordon Hendrickson. Mr. Hendrickson noted that the state records and archives law provides the methodology for determining the length of time state records should be retained and at what point it is appropriate to transfer state government records from agency offices to the State Records Center or to dispose of such records either by destruction or transfer to the State Archives. He emphasized the need for consistency in application of confidentiality provisions in open records laws for both federal and state government bodies. He made recommendations relating to the need to determine the appropriate length of time individual records series should be kept confidential, making a careful review of confidentiality provisions in other jurisdictions outside of Iowa to assure consistency in the application of the laws, including an executive privilege definition, and clarifying the term "lawful custodian," the government body currently in physical possession of the government record.

Judicial Branch. Judge Hutchison and Ms. Colton provided information about the proposed electronic data management system (EDMS) the Judicial Branch will be implementing to enable the use of electronic filing and the use of and access to electronic files in the Iowa court system. The Supreme Court's goal is to implement electronic filing in all courts statewide in five years. Ms. Colton noted that although a paperless court system will allow more efficient court operations and public access, there are concerns about information security and sensitive and personal information contained in court documents. Proposed rules of practice and procedure have been developed to address implementation of this electronic filing and recordkeeping system and include personal protection privacy measures to assist in protecting certain information from widespread dissemination.



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Judge Hutchison delineated three levels of access through the new system by noncourt personnel to court documents and files not deemed confidential: general public access for nonconfidential files or documents; registered user access to view and download nonconfidential files or documents; and registered filer access to file, view, and download all documents in cases in which the registered filer is a party to the case. There will be no cost to view a nonconfidential file or document, but registered users and registered filers will pay a fee as determined by the Technology Governance Board.

Mr. Tom Shepherd, DAS. Mr. Shepherd's presentation included recommendations relating to open meetings, public records, and state records and archives laws. Mr. Shepherd emphasized the need for government bodies to maintain the distinction between public records and value-added services when determining fees to be charged for access to electronic public records and data processing software. He also discussed the need to promote efficient and effective access to public records and recommended exempting extra copies of documents maintained by government bodies in Iowa solely for convenience or reference purposes from the definition of public record.

Other Presentations. The following persons representing various interest groups made brief presentations concerning their perspectives and proposed revisions relating to Iowa's open meetings and public records laws:

- Ms. Kathleen Richardson, Executive Secretary, Iowa Freedom of Information Council. Ms. Richardson also addressed the Committee on behalf of the Iowa Newspaper Association and the Iowa Broadcasters Association.
- Mr. David Vestal, General Counsel, Iowa State Association of Counties.
- Mr. Terry Timmons, Associate General Counsel, Iowa League of Cities.
- Ms. Mary Gannon, Attorney, Iowa Association of School Boards.
- Mr. Marty Ryan, Legislative Director, Iowa Civil Liberties Union.
- Mr. Dennis Allen, Vice President, Iowa Genealogical Society.
- Ms. Lauris Olson, an interested citizen and independent newspaper publisher.
- Ms. Tammie Picton, an interested citizen from Riverdale, Iowa.

II. October 19, 2007, Meeting

Overview. At the second meeting, Professor Bonfield presented his policymaking framework and the Committee reviewed, discussed, and made policy decisions and drafting recommendations. Professor Bonfield, Ms. Richardson, and Mr. Michael Guidicessi, an attorney who litigates public records and open meetings, joined in the Committee discussion.

Drafting Recommendations and Committee Action. The recommendations approved by the Committee for drafting in the form of proposed legislation for further Committee review are summarized as follows:

- Establish an independent state public information agency authorized to issue advisory opinions, issue rules, receive and investigate complaints, prosecute alleged violations, issue legally binding orders, and ensure adequate training by all public officials.
- Repeal the criminal sanctions relating to public records laws violations.



- Rewrite and consolidate many of the 59 confidential records exemptions in the public records laws to make the exemptions generally applicable instead of agency specific and make these exemptions consistent with the 11 exemptions in the open meetings laws.
- Create a qualified public records exemption relating to the identity and qualifications of an applicant for public employment.
- Clarify the scope of the current exemptions in the public records laws relating to personal information in confidential personnel records.
- Create a qualified personnel records exemption for personal information about identified individuals if the disclosure of such information would constitute an undue invasion of personal privacy.
- Authorize the Iowa Supreme Court to designate by rule the court records and information that are confidential including general policy considerations to guide the court's rulemaking.
- Clarify the types of nongovernment organizations that are subject to the public records laws, which types of information of such organizations that act solely to support a state or local government body are public, and who is the custodian of such information.
- Expand the discretion of courts to issue an injunction to enjoin the public inspection of government information otherwise subject to public inspection.
- Clarify and reaffirm the scope of the public availability of final settlement agreements between an agency or other government body and another entity or person.
- Provide specific timelines within which government information must be made available to the public.
- Clarify the definition of a "meeting" in the open meetings law to consider situations where a series of oral discussions or a series of e-mail exchanges each between less than a quorum of the members of a governmental body subject to the open meetings law occur.
- Establish express limits on the right of a governmental body subject to the open meetings law to recess a meeting without providing a new notice of the reconvened meeting.

III. November 9, 2007, Meeting

Overview. At the third meeting, Professor Bonfield discussed tentative draft language proposals relating to several items requested by the Committee at the Committee's meeting on October 19, 2007.

Committee Discussion and Action. The Committee discussed tentative draft language and requested the Legislative Services Agency Legal Services Division staff to prepare a preliminary bill draft for further Committee consideration and discussion at the Committee's next meeting to include the following:

- **Administrative Enforcement Scheme.** The establishment of an Iowa Public Information Board as an independent regulatory agency to provide an alternative means by which to secure compliance with and enforcement of the requirements of Code chapters 21 and 22. A person may seek enforcement of the provisions of Code chapters 21 or 22 by electing either to file a complaint with the board or to file a lawsuit in court.



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The board shall have authority to hire employees; issue rules and orders with the force of law; issue declaratory orders; receive, investigate, and prosecute complaints before the board in a contested case proceeding; issue subpoenas; and provide training about the requirements of chapters 21 and 22. The board shall offer all parties to a dispute the opportunity to resolve the dispute through mediation and settlement.

- **Civil Penalties.** Increasing the current civil penalties for violations of both Code chapters 21 and 22 to not more than \$2,500 but not less than \$1,000.
- **Criminal Sanction.** Repealing a provision in the open records law making knowing violations or attempted violations a simple misdemeanor.
- **Time Limits on Custodian for Responding to Record Requests.** Clarifying that the public be allowed to inspect or copy a public record at the time of the request, but if this is not feasible, the custodian of the record shall notify the requestor not later than five business days from the time of the request when such inspection or copying may take place unless there is good cause for the delay because of unusual circumstances. If the custodian is in doubt about the request, the custodian must make a determination within 10 days of the request, and if access to the record is allowed, it must take place within five business days from the date the custodian makes the determination. A denial must be in writing and must state the reasons for the denial.
- **Undue Invasion of Personal Privacy.** Adding an exemption to the public records law for material about an identified or identifiable person that if disclosed would constitute an unwarranted or undue invasion of personal privacy or that would present a clear and serious danger of facilitating identity theft or other criminal activity in relation to that person.
- **Privacy and Court Records.** Allowing the Iowa Supreme Court to issue rules requiring confidentiality of certain categories of material in court records consistent with the foregoing exemption relating to undue invasion of personal privacy.
- **Tentative, Preliminary, and Draft Material.** Adding an exemption to the public records law for tentative, preliminary, draft, speculative, or research material prior to final completion and prior to its submission for use in the final recommendation, adoption, or execution of any official policy or action. The Committee specifically asked that all stakeholders review this language and provide feedback to the Committee. The Committee will also review how other states handle this issue.
- **Government Employee Personnel Records.** Clarifying what information in personnel records of governmental bodies shall be public information to include the name and compensation of the individual, the date the individual was employed by the governmental body, the position the individual holds or has held with the governmental body, the individual's qualifications for the position, and any final disciplinary action taken against the individual.
- **Job Applications for Government Employment.** Adding an exemption to the public records law for the identity and qualifications of an applicant for public employment by a governmental body if the applicant requests anonymity in writing and the governmental body determines the anonymity is necessary to induce the applicant to apply for the position. Such information shall be exempt from disclosure until an applicant is a finalist



for the public employment position, defined as one of five or fewer applicants under final consideration for the position.

- **Injunctions.** Allowing the district court to issue an injunction prohibiting the disclosure of a public record upon a showing of any one of the following:
 - That disclosure would not be in the public interest because the potential harm to the public interest from disclosure outweighs any potential benefit.
 - That disclosure would substantially and irreparably injure a person because it would invade the personal privacy of the identified subject and the harm is not outweighed by the public interest in disclosure.
 - That the custodian's determination to disclose a record to the public is a violation of law or is arbitrary, capricious, unreasonable, or an abuse of discretion.
- **Final Settlement Agreements.** Specifying that all final binding settlement agreements between an agency or other unit of state or local government shall be available for public inspection and shall include a brief summary indicating the identity of the parties, the nature of the dispute, relevant facts in dispute, and the terms of the settlement.
- **Applicability of Public Records Law to Nongovernmental Bodies.** Clarifying current law that states that a governmental body shall not prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions by including language that all records in the possession or under the control of a nongovernmental body that are part of the execution or performance of the duties of the nongovernmental body under contract with a governmental body are public records.
- **Consistency in Exemptions.** Adding an exemption to the public records law making records containing information that would permit a governmental body subject to the open meetings law to hold a closed meeting in order to avoid public disclosure of that information.
- **Electronic Meetings.** Adding a provision to the definition of a meeting in the open meetings law to provide that electronic meetings that are preserved by one or more members of a governmental body and sent to a majority of its members or a series of such communications each sent only to a minority of its members but that in the aggregate is sent to a majority of its members shall not be defined as a meeting under the open meetings law if the electronic communications are either posted on the body's web site or bulletin board or copies are made available to the public.
- **Walking Quorums.** Adding a provision to the open meetings law defining a meeting to include the calculated use of a series of communications each between less than a majority of the members of a governmental body that reaches a majority of the members and that is intended to discuss and develop a final agreement of the majority outside of a meeting.
- **Reconvened Meetings Notice.** Creating an exception to the public meeting notice requirement for a meeting that is reconvened within four hours of the start of a recess in a meeting where the time, date, and place of the reconvened meeting is announced in open session and is recorded in the minutes and there is no change in the agenda.



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- **Code Chapter 22 Definitions.** Adding definitions to the public records law clarifying the definitions of "record," "government record," "public record," "confidential record," and "optional public record" as follows:
 - "Record" includes information of every kind, nature, and form preserved or stored in any medium, including but not limited to paper, electronic, or film media.
 - "Government record" means all records owned by, created by, in the possession of, or under the control of a state or local government.
 - "Public record" includes all government records which the public has a right to examine and copy and includes all government records that are not designated by law as either confidential records or optional public records.
 - "Confidential record" means all government records designated confidential by law.
 - "Optional public record" means all government records designated confidential by law unless otherwise ordered by a court, the lawful custodian of the record, or by another person authorized to release the record.

IV. January 10, 2008, Meeting

Overview. At the fourth meeting, Ms. Gannon; Mr. Vestal; Mr. Timmons; and Ms. Shannon Strickler, Director of Government Relations, Iowa Hospital Association, presented a joint document commenting on several issues from a local government perspective relating to the proposed draft legislation. Ms. Richardson, Mr. Angrick, Ms. Colton, Mr. Hendrickson, and Mr. Ryan presented additional comments. Professor Bonfield reviewed the proposed committee draft legislation prepared by the Legislative Services Agency (LSA) with the Committee.

Drafting Recommendations and Committee Action. The Committee discussed and agreed to revisions in the bill draft relating to reasons for delays that may occur in responding to requests for public records, the definition of compensation information identified as public record information in personnel records of government bodies, parental or guardian access to a minor child's library records, the confidentiality of certain tentative, preliminary, or draft materials, and the Iowa Public Information Board's authority to file an action concerning removal of a person from office due to repeated violations of Code chapter 21 or 22.

The Committee also agreed that additional conforming and technical Code changes should be included in the LSA draft for final Committee consideration and that a separate bill addressing issues relative to Code chapter 305 should be drafted upon the advice of Mr. Hendrickson and Professor Bonfield.

V. February 7, 2008, Meeting

Committee Action and Recommendation. At the fifth and final meeting of the Committee, the Committee unanimously agreed to approve the bill draft, LSB 5233IC, as a Freedom of Information, Open Meetings, and Public Records Interim Study Committee Bill for submission to legislative leaders for consideration during the 2008 Session of the General Assembly.



VI. Legislative Consideration

The draft approved by the Study Committee became HSB 654 and SSB 3164 and the study bills were referred to their respective chambers' committees on State Government. The Senate Committee on State Government approved the bill with amendments and it was introduced on March 10, 2008, as SF 2378. The bill was referred to the Committee on Appropriations on March 21, 2008, where it was amended to be sponsored by that Committee and introduced as SF 2411 on April 30, 2008. Senate File 2411 was amended and passed by the Senate on April 14, 2008. It was referred to the House Committee on State Government which recommended amendment and passage on April 16, 2008. Pursuant to House Rule 31.7, SF 2411 was referred to the Committee on Appropriations on April 16, 2008. The bill was not further debated before the General Assembly adjourned the 2008 Legislative Session on April 26, 2008.

VII. Materials Filed With the Legislative Services Agency

The following materials listed were distributed at or in connection with the Committee's five meetings and are on file with the Legislative Services Agency. The materials may be accessed from the "Additional Information" link on the Committee's Internet web page:

<http://www.legis.state.ia.us/aspx/Committees/Committee.aspx?id=216>

February 7, 2008

1. Committee Recommended Bill Draft – Public Records/Open Meetings.

January 10, 2008

2. Proposed Bill Draft Language – Public Records/Open Meetings (LSA).
3. Comments – Proposed Draft Language (ISAC, ILC, IASB, IHA).
4. Mr. Gordon Hendrickson, State Archivist, Comments on Draft Language.
5. Ms. Kathleen Richardson, IFOIC, Comments on Draft Language (December 12, 2007).
6. Mr. Marty Ryan, ACLU, Comments on Draft Language.
7. Ms. Rebecca Colton, Iowa Judicial Branch, Proposed Legislation.
8. Ms. Shannon Strickler, IHA, Comments.
9. Mr. William Angrick, Citizens' Aide/Ombudsman, Statement re: Draft Language.
10. Mr. William Angrick, Comments on Draft Language (December 7, 2007).
11. Mr. William Angrick, Review of Code Section 22.7 Exemptions.



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November 9, 2007

12. University of Iowa Law Professor Arthur Bonfield, Proposed Decisionmaking Draft Items.

October 19, 2007

13. Iowa Freedom of Information Council (IFOIC), Comments on Electronic Court Records (April 23, 2007).
14. Iowa Supreme Court, Statement to Committee.
15. Ms. Kathleen Richardson, IFOIC, Comments on September 6, 2007, Meeting.
16. Ms. Kathleen Richardson, IFOIC, Suggested Changes to Iowa's Open Meetings and Public Records Laws.
17. University of Iowa Law Professor Arthur Bonfield, Proposed Policymaking Framework.
18. Mr. William Angrick, Citizens' Aide/Ombudsman, Comments and Proposal.
19. Mr. William Angrick, Investigative Report (July 13, 2007).
20. Iowa Hospital Association – Policy Proposals.

September 6, 2007

21. University of Iowa Law Professor Arthur Bonfield, Presentation--Suggested Revisions to Code Chapters 21, 22, and 305.
22. Mr. William Angrick, Citizens' Aide/Ombudsman, Presentation.
23. Statement of Gordon O. Hendrickson, Ph.D., State Archivist.
24. Ms. Marsha Ternus, Chief Justice of the Iowa Supreme Court, State of the Judiciary (January 10, 2007).
25. Proposed Court Rules for Electronic Filing and Electronic Files in Iowa Courts (January 11, 2007).
26. Mr. Tom R. Shepherd, DAS, Information Technology Enterprise: Iowa Code Chapters 21, 22, and 305 Comments and Recommendations.
27. Ms. Kathleen Richardson, Executive Secretary, IFOIC, Iowa's Access Laws: Problems and Solutions.



28. Ms. Kathleen Richardson, Proposed Amendments to Chapters 21 and 22.
29. Ms. Kathleen Richardson, Presentation to Senate and House State Government Committees (February 5 and 6, 2007).
30. Ms. Kathleen Richardson, State Access Counselors – In Search of a Responsive Government (October 2, 1999).
31. Mr. Harry Hammit, Editor/Publisher, Access Reports, Mediation Without Litigation.
32. Mr. David Vestal, General Counsel, Iowa State Association of Counties, Comments.
33. Mr. Terry Timmons, Associate General Counsel, Iowa League of Cities, Open Meetings/Open Records Issues.
34. Ms. Mary Gannon, Attorney, Iowa Association of School Boards, Comments on Iowa's Open Meetings and Public Records Laws.
35. Ms. Mary Gannon, Additional Comments.
36. Mr. Marty Ryan, Legislative Director, ACLU of Iowa, Problems to be Addressed in Iowa's Open Meetings and Open Records Laws.
37. Mr. Dennis Allen, Vice President, Iowa Genealogical Society, Comments.
38. Mr. Dennis Allen, Presentation Notes.

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